

But it is said, that though the holder of a subsequent mortgage may be preferred to the holder of a prior unrecorded mortgage, without notice; yet if, though not recorded, the former has notice in fact of its existence, the holder of the unrecorded mortgage will be preferred, that is, that notice in fact is equivalent to the registration of the deed, and that as in this case, Dawson and Norwood, the parties to whom both mortgages were given, must of course have had notice of the first, their assignees of the posterior one, standing in their shoes, are bound by the equities which affected the instrument in their hands, There is no doubt, though it has been sometimes regretted, that in a state where the registration of conveyances is required, if a subsequent purchaser has actual notice at the time of his purchase of a prior unregistered mortgage, he will not be permitted to avail himself of his purchase against the prior conveyance; and the ground upon which the doctrine rests, is, that the taking of a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser.

It is put upon the ground of fraud, and is subject to this qualification, that the prior unrecorded conveyance shall be available only in cases, where the notice is so clearly proved as to make it fraudulent in the subsequent purchaser, to take and record a conveyance, in prejudice to the known title of the other. 1 *Story's Equity*, sections 397, 398. *Le Neve vs. Le Neve*, 3 *Atkyns*, 654. *Jackson vs. Van Valkenburgh*, 8 *Cowen*, 264.

Assuming this to be the ground, and it seems too clearly established by authority, and justified by principle to dispute it; and it would be difficult to maintain, that Dawson and Norwood, in taking the second mortgage, are within the reason of the principle. In taking this second mortgage, they were not taking away the right of another person, by getting the legal title. They cannot be said to have been practicing fraud upon themselves, by a contrivance to defeat the prior conveyance, for that private conveyance constituted their own security, for a large sum of money. Suppose the controversy in this case, instead of being between the trustees of Jones, and the plain-